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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965

No. 731

W. D. HARRIGAN, DORINE HARRIGAN, VIRGINIA H. O'MELIA and T. H. O'MELIA,
Petitioners

v.

PHILLIP J. HAMM, as Commissioner of Revenue of the State of Alabama,
Respondent

Petition For A Writ Of Certiorari
To The Supreme Court of Alabama

BRIEF FOR RESPONDENT IN OPPOSITION.

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Petitioners

v.

PHILLIP J. HAMM, as Commissioner of Revenue of the State of Alabama,
Respondent

Petition For A Writ Of Certiorari To The Supreme Court of Alabama

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW

The opinion of the Supreme Court of Alabama rendered September 9, 1965 is not reported, however, the opinion in its entirety is set out in Appendix B, pp. 29-47 of the Petition For Writ of Certiorari.[1] The decree of the Montgomery County Circuit Court which decree was reversed by the Alabama Supreme Court in its opinion of September 9, 1965, supra, is not reported.

[1] It appeared unnecessarily prolix to include the opinion as an appendix to the Respondents' brief as the Court has the opinion available in the Petition for Writ of Certiorari.

JURISDICTION

The Respondent contends that there is no Federal question involved in this case. The state income tax which is herein complained of by the Petitioners is imposed fairly and impartially to all persons in a class. The Petitioners are residents of Alabama and the state by its revenue commissioner had jurisdiction of the parties and the subject matter. The issues were fully debated and determined by the Courts of Alabama. The lengthy opinion of the Supreme Court of Alabama[2] attests to the careful consideration given to the contentions of the Petitioners. The right of the Petitioners to "due process" has been fully accorded in consonance with Amendment 14, Constitution of the United States. Thus it is respectfully submitted that this Court has no jurisdiction to entertain this cause.

QUESTION PRESENTED

The Supreme Court of Alabama has rendered an opinion on the question of whether the Petitioners having failed to appeal from a final assessment of the State of Alabama, Department of Revenue within the time allowed by Section 140, Title 51, Code of Alabama 1940, as amended, may, after such failure, institute a mandamus proceeding as provided for in Section 407, Title 51, Code of Alabama 1940, as amended.[3]

The questions for this Court are:

1. Whether the Supreme Court of the United States will disturb an opinion of a state supreme court where the question before the state court was merely one of failure (laches) by the Petitioners to exercise their right of appeal in accordance with statutory provisions,[4] further, where prior cases hold that if a specific statutory remedy is provided, the remedy is exclusive and no other remedy such as mandamus and declaratory

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[2] Appendix B, pp. 29-47 of Petition For Writ of Certiorari.

[3] Ibid

[4] Section 140, Title 51, Code of Alabama 1940, as amended.

judgment may be substituted for the special statutory remedy?

2. Whether the Supreme Court of Alabama has violated the provisions of the "due process" provision of the Fourteenth Amendment of the Constitution of the United States, as alleged by the Petitioners, when the records below[5] show that the Petitioners had an administrative determination (judicial in the opinion of Alabama courts)[6] before the State Department of Revenue; had the matter litigated in the Montgomery County Circuit Court, and, lastly, had the matter fuller covered by a lengthy opinion of the Supreme Court of Alabama?[7]

3. Whether the Supreme Court of Alabama has, as is contended by the Petitioners departed from and overruled its own prior opinions[8]--which contention is emphatically denied by the Respondent and which denial is affirmed by the record below[9]--in its opinion in this case?

4. Whether the Supreme Court of Alabama has, as is contended by the Petitioners, violated Amendment 14 of the Constitution of the United States by allowing other taxpayers in the same circumstances[10] as the Petitioners to prosecute a mandamus or other proceeding in the courts after failure of such taxpayer or taxpayers to appeal within the time allowed under Section 140, supra, from a final assessment of the Department of Revenue?

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[5] Which records are before the Court.

[6] State v. Woodroof, 253 Ala. 620 46 So. 2d 553, inter alia.

[7] Petition For Writ Of Certiorari, pp. 29-47.

[8] See the opinion of the Supreme Court of Alabama in Petition For Writ of Certiorari wherein Justice Coleman for the Supreme Court distinguishes the prior opinions from the instant case. See also, Graves v. McDonough, 264 Ala. 407, 88 So. 2d 371; State v. First National Bank of Auburn, 273 Ala. 379, 141 So. 2d 196; State v. Brown, 254 Ala. 215, 48 So. 2d 36; Buchanan v. State, 274 Ala. 592, 150 So. 2d 200; Bashinsky v. Sparks, 274 Ala. 166, 146 So. 2d 303.

[9] See final assessments: Harrigan file, p. 33 and O'Melia file, p. 40.

[10] Ibid

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Respondent agrees with the Petitioners that Amendment 14 of the Constitution of the United States, and Sections 140, 388, 407, 410, 414, 53, and 913, Title 51, Code of Alabama 1940[11] are involved in this litigation consistent with the contentions of the Petitioners. However, the Respondent respectfully submits that Section 140, supra, is the primary and controlling provision. The Fourteenth Amendment, supra, has not been violated.

STATEMENT

These cases originated as mandamus proceedings by the Petitioners in the Circuit Court of Montgomery County Alabama[12] wherein the Petitioners sought to have the court order the Commissioner of Revenue to refund state income tax paid by the Petitioners for calendar year 1958.[13] The Petitioners had, prior to the mandamus proceedings, petitioned for refund[14] under the provisions of Section 410, supra. This petition had been denied by the Respondent, Commissioner of Revenue, on the grounds that the assessments against the Petitioners had become final[15] as provided for in Section 407, supra. The Respondent's action was based on the established premise that Section 410, supra, does not apply in instances where assessments have become final under Section 407, supra.

Section 407, supra,[16] provides, in part, that ". . .Within thirty days from the date of mailing the letter advising the taxpayer of such assessments the taxpayer may appeal from such

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[11] Set out in Petition For Writ Of Certiorari, pp. 19-28.

[12] Harrigan Transcript, pp. 1-5; O'Melia Transcript, pp. 1-5.

[13] See Exhibit A, Harrigan Transcript p. 6 and O'Melia Transcript, p. 6.

[14] Harrigan, pp. 6-8; O'Melia, pp. 5-8.

[15] Harrigan, pp. 16 and 17; O'Melia, pp. 15 and 16.

[16] Petition For Writ Of Certiorari, pp. 23 and 24.

assessments in the same manner as in cases of appeals from assessments made by the department of revenue as provided in this title."

Section 140, supra,[17] is the statutory provision governing appeals from final assessments of the Department of Revenue. The appeal must be taken within thirty (30) days from the date the assessment is made final.

The Petitioners, being barred from appeal under Section 140, supra, by the passage of more than thirty (30) days, substituted a mandamus proceeding in the Montgomery Circuit Court and the Court granted peremptory writs of mandamus[18] ordering the Respondent, Commissioner of Revenue, to certify to the comptroller of the State of Alabama that certain income tax paid by the Petitioners for calendar year 1958 should be refunded to the Petitioners.

The Respondent appealed the adverse decisions[19] to the Supreme Court of Alabama and the Supreme Court reversed the Montgomery Circuit Court in a lengthy and comprehensive opinion.[20] The contention of the Commissioner of Revenue that once an income tax assessment had been made final under Section 407, supra, the only remedy available to the taxpayer was by appeal of such assessment under Section 140, supra, was upheld. The Court stated, in substance, that the Petitioners could not proceed under Section 410, supra, by a petition for refund nor could they proceed by the substitution of a mandamus proceeding when the plain, adequate, and complete statutory remedy provided had been lost by the passage of time. The Court below did not emphasize the point; but it is well to note that the loss of the right was by the neglect (laches) of the Petitioners. They knew the statutory provision

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[17] Petition For Writ Of Certiorari, pp. 18-23.

[18] Harrigan, pp. 17-19, O'Melia, pp. 19-22.

[19] Harrigan, p. 23; O'Melia, p. 20.

[20] Petition For Writ Of Certiorari, pp. 29-47.

for appeal and they executed waiver[21] requesting that the assessment be made final. The language of the waiver has some significance. The most significant part, thereof, is as follows:

> "Said taxpayers for reasons deemed most beneficial to them hereby and by these presents do urge and request the Department of Revenue to make final the assessment of income tax against them on December 30, 1959, for the calendar year 1958. . . ."

Subsequent to the assessment being made final the Petitioners learned of the opinion of the Supreme Court of Alabama in Buchanan v. State, 274 Ala. 592, 150 So. 2d 200, rendered October 18, 1962. The Court in the Buchanan case found that liquidating dividends, paid by a domestic corporation, were exempt[22] from state income tax, when that corporation had paid all income taxes due to the state, the dividend was distributed in kind, and the assets distributed had been acquired by the corporation solely from earnings and income of the corporation.

The Petitioners in the courts below contended that they, having similar factual circumstances, should be accorded the same treatment as the taxpayer in Buchanan. There is at least one obvious difference—a difference which is all controlling—in the cases. The taxpayer, Buchanan, appealed from the final assessment (Section 407, supra) within the thirty (30) days allowed by Section 140, supra. The Petitioners in the instant case failed (laches) to exercise their right of appeal within the time permitted.

The Supreme Court of Alabama in its excellent opinion of September 9,[23] last, recognized the distinction between the instant case and Buchanan; it, likewise went to great length to successfully distinguish the other cases relied on by the Petitioners from the instant case.

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[21] Harrigan, p. 15; O'Melia, p. 14.

[22] See Section 388, Title 51, Code of Alabama, 1940, as amended, Petition For Writ Of Certiorari, pp. 22 and 23.

[23] Petition For Writ Of Certiorari, pp. 29-47.

ARGUMENT

The Petitioners had a plain, speedy and efficient remedy at law within the meaning of Title 28, USCA, Section 1341.

Section 1341 provides as follows:

> "The district courts shall not enjoin, suspend or restrain the assessment of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Section 140, supra, is that "plain, speedy and efficient remedy" contemplated by Section 1341, supra.

The Petitioners having failed to assert their right to judicial review in the Alabama courts cannot now assert that they did not have a plain, speedy, and efficient remedy. In Reiling v. Lacy, 93 F Supp 462, 467, appeal dismissed 341 U.S. 901, 71 S.Ct. 614, 95 L.Ed 341, the District Court of Maryland stated:

> "It is conceded in the present case that, as plaintiff claims, the procedure afforded by Maryland law for contesting the validity of a tax is not available to him because more than three years have elapsed since the date on which his income tax returns for the years here in question should have been filed. But plaintiff goes further and claims that, although the Maryland income tax law provides for notice and right of appeal to the State Tax Commission, he has not been given any right of appeal or any other reasonable opportunity to be heard. However, this is not in fact true. The plaintiff did have a right of review and a right of appeal to the state tribunals but failed to take advantage of these rights." (Emphasis supplied)

In Abernathy v. Carpenter (1962), 208 F. Supp. 793, 796 the Court interpreted the meaning of Title 28, USCA, Section 1341 as to "plain, speedy and efficient remedy". The Court said:

> "The fact that the plaintiffs in the case at bar did not pursue their administrative remedy within the thirty days allotted by statute after receiving their letter of assessment can only imply that they were guilty of

a certain amount of laxity which might possibly amount to laches."

The Petitioners in their argument, first (Petition for Writ of Certiorari, p. 7) address themselves to the allegation that the Supreme Court of Alabama has in its opinion of September 9, 1965[24] discriminated against one or several individuals of a class by subjecting them to taxation not levied on others in the same class.

The argument is patently fallacious in that the record below bears out the fact that the Petitioners did not appeal[25] from final assessments[26] (Section 407, supra) of the State Department of Revenue. This failure (laches) placed the Petitioners in a separate class from the Appellants in the Buchanan case. The Supreme Court of Alabama in its opinion of September 9, last, refutes the contention of the Petitioners that the Appellant, Buchanan, was accorded a privilege not granted to Petitioners. The Supreme Court by Justice Coleman stated, in part, as follows:

"Taxpayer concedes in brief, of course, that Buchanan is not res judicata here, but says that it is 'equally obvious this court intended Buchanan to have future application in all cases involving similar facts'. We agree that the rule in Buchanan should apply to all taxpayers alike, but we do not agree that there has been unequal application of the rule here, or any unequal treatment of the instant taxpayer.

"The instant taxpayer had the same opportunities and the same rights which the taxpayer enjoyed in Buchanan. As we understand it, the statutes were the same in both cases. The taxpayer says that the facts were the same in all material aspects. What then is different?

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[24] Petition for Writ of Certiorari, pp. 29-47

[25] See decree of Montgomery Circuit Court Harrigan, p. 20 and O'Melia, p. 17

[26] Harrigan, p. 36; O'Melia, p. 33

"As it seems to us, the difference is, that in Buchanan, the taxpayer took an appeal under Section 140, Title 51, and the instant taxpayer, for good and sufficient reasons which are known to him but not to the court, chose not to appeal under Section 140. Where the instant taxpayer was accorded the same right which the other taxpayer had but did not exercise it, we do not think that the law favored one over the other, or, in any sense, denied either of them that which was his exact and equal due." (Emphasis supplied)

The Petitioners likewise rely heavily on the opinion of the Supreme Court of Alabama in Graves v. McDonough, 264 Ala. 407, 88 So. 2d 371. This was an ad valorem tax case. The taxpayer had a special remedy for attacking the assessment. Under Section 53, Title 51, Code of Alabama 1940, as amended, he could appeal within thirty days to the Circuit Court of the county in which the property was located. The taxpayer failed to do this. The court allowed a suit for refund in Graves v. McDonough; however, the court in its opinion in the instant case effectively distinguishes the two cases. The Court stated, in part, as follows:[27]

"The income tax assessment in the instant case is not void, as we understand it. The assessment may well be erroneous under Buchanan v. State, supra. The department of revenue had jurisdiction of parties and subject matter. Since the assessment was not void, the rule applied in Graves v. McDonough, supra, does not apply here. In Graves v. McDonough, this court said:

" 'It is the general rule that a taxpayer seeking judicial relief from an erroneous assessment must have exhausted his remedies before the administrative body empowered initially to correct the error. * * *
An exception is made when the attempted assessment is a nullity because the property is either tax exempt or outside the jurisdiction. . . .'

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[27] See Opinion in Petition for Writ of Certiorari, pp. 37 and 38

"In the case at bar, the assessment is not within the exception, but is within the general rule, and the McDonough case seems to be authority in favor of the commissioner and against the taxpayer."

The Supreme Court likewise distinguished the case of State v. First National Bank of Auburn, 273 Ala. 379, 141 So. 2d 196.[28] The Courts analysis, without further comment, is as follows:[29]

"In State v. First National Bank of Auburn, 273 Ala. 379, 141 So. 2d 196, this court considered the finality of an excise tax assessment made under § 425, et seq., Title 51. The question arose when taxpayer undertook to carry back to 1952 (tax year 1953), a loss which occurred in 1953 and 1954. The state contended that the assessment for 1952 was made final on July 2, 1953, that taxpayer did not appeal under § 140 within thirty days, and, therefore, that there was no way to re-open the assessment and allow a carry-back of the loss sustained in subsequent years. This court rejected that contention, saying that to disallow the carry-back would be to nullify the statute, which expressly authorized the carry-back, and defeat the legislative intent. It seems clear that if, in a tax year, a taxpayer made a profit and owed income tax, he would pay the tax without appealing the assessment; and, if he subsequently suffered a loss, the only way he could carry the loss back would be to re-open the prior assessment. Subject to the restrictions of the Constitution, the legislature has power to provide for the collection of income taxes and to provide for the manner of calculating the tax in allowing relief for losses. The allowance of the carry-back was part of the manner of calculation prescribed by the legislature, and was allowed for that reason. In the instant case, we are not concerned with a legislative act which compels the re-opening of an assessment in order to make the act effective. Neither the facts nor

[28] Cited by Petitioners in Petition for Writ of Certiorari, pp. 12 and 13

[29] Petition for Writ of Certiorari, pp. 38 and 39

the statute have changed since the assessment was made final in the case at bar. When the assessment was made final, all the facts now relied on by taxpayer were in existence and available to him. In the waiver and request for assessment, he reserved the right to appeal, but did not do so. A change in the statute, similar to that which led to the decision in State v. First National Bank of Auburn, does not exist here. Actually the appeal in the last cited case was from an assessment for a year other than 1953. The Court said:

> "'Appellee unquestionably is entitled to a refund of the excise tax paid in the amount of $539.13 for the tax year 1953, by reason of a carry-back to that tax year of a loss in the amount of $8,985.51, or to a credit of said loss against its net income for the tax year here involved as a carry-over to that year. In either event, the same amount of excise tax is involved. Since the State has rejected appellee's application for a refund, by way of a carry-back, what ground is there for denying appellee relief by carrying the loss over to the tax year here involved? Aside from any other consideration to deny such relief would be unjust. . . .' (273 Ala. at pages 382, 383.)

"We are of opinion that the last cited case does not support the decree appealed from in the case at bar."

The Petitioners also cite State v. Brown, 254 Ala. 215, 48 So. 2d 36, as an opinion which is at variance with the Courts' opinion in the instant case. Again, the court in its opinion shows why there is no conflict between the opinions. The Court said:[30]

> "In State v. Brown, 254 Ala. 215, 48 So. 2d 36, this court held a taxpayer entitled to refund for certain income tax paid to the state. The opinion refers to a stipulation that 'taxpayer duly and properly filed application for refund of income tax,' and the record discloses such an application. The case, however, was not a

[30] Ibid, pp. 35 and 36

proceeding for refund under § 410. This court did note that taxpayer filed petition for refund under § 410, but the petition for refund was filed before the assessment was made final, because the assessment was not final until made so by the decision of this court. We have examined the transcript in State v. Brown, supra. It discloses that the proceeding in the circuit court was an appeal from final assessment pursuant to § 140, Title 51. The bill of complaint and the decree of the trial court so recite. The opinion of this court recites that 'Agreements were made from time to time. . .extending the time for making the final assessment. . . .' Brown sheds no light on the question as to what is the finality of an assessment under § 407, which was not appealed, with respect to § 410. Nothing in Brown supports taxpayer's contention in the instant case."

The Petitioners argument in regard to State v. Woodroof, 253 Ala. 620, 631, 46 So. 2d 553[31] is somewhat strained. State against Woodroof did say as dicta that a refund can be made if petition is made within two years from date of payment. However, the dicta clearly relates to cases in which there was no final assessment. There was a final assessment in the Woodroof case.

The Petitioner attempts to distort and confuse a statement made in Regulation 407.1, Income Tax Rules of the Department of Revenue which states in part that if no error is found in an income tax return "it shall be entered on the tax role thereby making final assessment against the taxpayer in the amount shown by the return. . . ."

Petitioner intimates that such an assessment is equivalent to an assessment made final under Section 407, supra; and that, therefore, when the Supreme Court of Alabama states, as dicta, in Woodroof that petitions for refund may be made within two years from date of payment, the court is of necessity allowing petition for refund after an assessment is final under the authority of Regulation 407.1, supra. Such reasoning, it is

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[31] Petition for Writ of Certiorari, pp. 13 and 14

reiterated, is an obvious distortion of the office of a final assessment under Section 407, supra. Only by following the assessment procedure as outlined in Section 407, supra, does an income tax assessment become final.

The Court's comment in its opinion of September 9th, effectively refutes the allegation that the opinion in the instant case conflicts with the opinion in the Woodroof case. The analysis of the Supreme Court is most thorough and is most significant; therefore, its comments distinguishing Woodroof from the instant case are quoted at length following:[32]

> "In Woodroof, this court considered the priority of certain liens for taxes due the state, over liens due the United States, in a proceeding for dissolution of a corporation. With respect to the perfection of a lien, this court said:
>
> "'. . . In the controversy before us, we will act on the assumption that if on June 4, 1948, the State had a lien for taxes due it on the property that went into the hands of the receiver, and that such lien was specific and perfected, we should hold that it took priority over the claim of the United States upon the free funds in the receivership, which arose from a sale of the property on which such lien existed at that time.
>
> "'And we think, as applied to a state's claim of a lien for taxes, such lien is specific and perfected, if the amount of it has been fixed by a proceeding which is binding and conclusive at the date of receivership, and not open for change in any sort of proceeding which might arise thereafter; and that the lien upon the property which was received by the receiver was not dependent upon any contingency, nor subject to selection, shift or change, and nothing remained to be done then or thereafter to make such lien complete, specific or perfect, or to liquidate the debt, and nothing could be done thereafter to

[32] Ibid, pp. 40-43

discharge the debt or subordinate such lien but full payment of the debt. . .' (253 Ala. at page 630).

"The court discussed first an income tax claim of the state for $36.22. With respect to §§ 407 and 410, Title 51, the court said:

"'. . .Section 407, Title 51, Code, directs the manner of making the assessment upon hearing and provides for an appeal, as provided in section 140, Title 51. Such assessment has judicial qualities. Birmingham Vending Co. v. State, 251 Ala. 584, 38 So. 2d 876. A judgment on appeal under section 140, supra, is as final as any other judgment. An assessment from which no appeal is taken is likewise conclusive when the procedure provided in section 407, Title 51, is complied with. (Emphasis supplied.) If no such procedure as there provided is pursued, the amount shown by the taxpayer's return is prima facie the correct amount of his tax liability. If nothing further is done as to his return, such amount remains prima facie correct. In that event, it has not become a fixed liability until it shall be assessed, which must be done, if at all, within two years. Section 412, Title 51, Code. The amount of tax so imposed shall be paid on the 15th day of the third month following the close of the fiscal year (subject to future installment payments). This taxpayer was on a fiscal year basis, as of October 31st. The record in this case does not show that there was any assessment made of this income tax as provided in section 407, supra, but the return of the taxpayer was only prima facie the correct amount of his liability. Any payment of same was subject to a refund within two years if erroneous. Section 410, Title 51, Code; Curry v. Johnston, 242 Ala. 319, 6 So. 2d 397. The amount of the debt secured by the lien was not effectually fixed and, therefore, the lien was not specific and perfected' (253 Ala. at page 631).

"Thus the court held that the income tax lien was not perfected because the procedure of § 407 had not been followed and because taxpayer, in such case, could apply for refund under § 410. The court says that a judgment on appeal under § 140 'is as final as any other judgment,' and an assessment, from which no appeal is taken, 'is likewise conclusive,' when § 407 is complied with.

"In the case at bar, § 407 was complied with and no appeal was taken. Under **Woodroof**, the instant assessment was final and conclusive as any other judgment, and was 'not open for change in any sort of proceeding which might arise thereafter."

The Petitioners allegations in regard to **Bashinsky v. Sparks**, 274 Ala. 166, 146 So. 2d 303 are wholly refuted by the record in that case. Petitioners have seized upon a mechanical error[33] in the decree of the Montgomery Circuit Court wherein the Court inadvertently referred to a final assessment where, in fact, there was no final assessment. The opinion of the Supreme Court of Alabama in **Bashinsky v. Sparks**, supra,[34] does not refer to a final assessment at any point in the record other than the mechanical error referred to above.

In fact the statement in paragraph number 10 of Petition for Mandamus in the **Bashinsky** case[35] that the Department of Revenue on September 17, 1957, "assessed" income taxes against the Petitioners, Bashinsky, refers to a letter[36] from E. A. Erwin, Chief, Income Tax Division, Department of Revenue, to the Petitioners, Bashinsky. The letter refers only to the tax as a deficiency and the reference in paragraph 10, supra, applied to this letter--note the same date, September 17, 1957--which was in no sense an assessment as provided

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[33] Ibid, p. 76

[34] Ibid, pp. 75-78

[35] Ibid, pp. 67, Appendix D

[36] Appendix A, hereto.

for in Section 407, supra; therefore, the Petitioners can take no solace from nor receive aid from the Bashinsky case. It in no way conflicts with the opinion in the instant case. The court did not address itself to the opinion in Bashinsky v. Sparks, supra, because it was not significant in the instant case. The Court did not sub silentio[37] overrule the Bashinsky case; rather, it followed a consistent and long established policy in both the Bashinsky case and in the instant case. The Court has shown remarkable consistency in all the cases cited above. In fact, in spite of the Petitioners alarming allegations of discrimination and inconsistency, a careful examination reveals no discrimination but rather reveals a long line of cases, the opinions of which support the contentions of the Respondent.

II

The Petitioners would have the entire assessment procedure of the Department of Revenue, a procedure established by statute and affirmed by numerous court decisions over many years, yield to the cause of the Petitioners. It is not denied that statutory limits to causes of action work a hardship on those who lose their right to contest; but, on the other hand, statutory limitations as provided for in Section 140, supra, serve a valid and necessary purpose. First, they provide an orderly procedure for adjudicating claims between the government and its citizens–and in some instances between citizens--; Second, they provide circumstances wherein the litigation must come to an end. The Supreme Court of Alabama in its extended opinion[38] in the instant case stated the premise cogently when it said that "the public good demands" that there be an end to litigation.

The courts and the legislature in the interest of achieving the desired orderly procedure necessary in tax assessment and

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[37] Petition for Writ of Certiorari, p. 14

[38] Ibid, p. 49

collection have clothed the final assessments of the Department of Revenue with judicial authority. Final assessments, including those final assessments[39] made under Section 407, supra, in the instant case, if not appealed from under Section 140, supra, within thirty (30) days from the date of final assessment are equivalent to a judgment of a circuit court of this state.

The legal maxim runs, in substance, in this wise; i.e. **a final assessment of the State of Alabama, Department of Revenue, unappealed from is a judgment as final and conclusive as if it were a judgment of a circuit court of Alabama and, it follows, therefore, that the matter so determined is res judicata.**

State v. Woodroof, supra, enunciates the above maxim extremely well. The case involved a claim filed by the state of Alabama against a bankrupt corporation. The claims of the United States were granted priority by the County Court of Limestone County. From the decree of the county court, the state appealed. The question ultimately determined by the Supreme Court was that of priority of the claims of the State of Alabama in relation to those of the United States. The court held that the state's claim for sales tax was prior in time and, therefore, took precedence over claims of the United States. It made the following statement, inter alia, concerning a final assessment of the Department of Revenue:

> "The final assessment not appealed from is as conclusive as the judgment of an ordinary court. It is the judgment of a tribunal constituted a court by the legislature as authorized by Section 139 of the Constitution, and is conclusive as such. Being rendered on March 29, 1948, and no appeal having been taken in thirty days, Section 140, supra, no attack can be made upon it except such as applies to an ordinary court judgment. It, therefore, conclusively fixed the amount of the tax claim as of March 29, 1948."

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[39] Harrigan, p. 36; O'Melia, p. 33

State v. Jones, 252 Ala. 479, 41 So. 2d 280 supports[40] the above conclusion even though the court found that there was no final assessment in the case. The court stated, in part, as follows:

> "It is settled law in this jurisdiction that when the amount of an obligation has been legally fixed and determined it cannot by reason of such constitutional restriction be released unless its collection is doubtful and then only by the Board of Compromise, under Section 12, Title 55, Code of Alabama 1940. So in applying Section 100 of the Constitution to any particular situation it is necessary to determine first whether the amount of the claim has been fixed and determined and that involves the question of who has the right to fix and determine it. When the department of revenue is charged with the duty of making a final tax assessment and in so doing, the taxpayer has an opportunity to be heard in such a way as to accord due process, such final assessment by the department fixes the claim and is conclusive of the amount of it unless that final assessment is attacked and overturned in some way authorized by law for its review. Hence the holding that such a final assessment cannot be compromised or settled for an amount less than that as finally fixed, by reason of the inhibition of Section 100, unless the claim is doubtful of collection and then only by authority of the Board of Compromise. Opinion of the Justices, 251 Ala. 96, 36 So. 2d 480." (Emphasis supplied)

Sparks v. Brock and Blevins, 145 So. 2d 844 summarizes the opinion of the Supreme Court of Alabama as to a final assessment of the Department of Revenue. The Court stated, in part, as follows:

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[40] See Fuqua v. Spry Burial Ins. Co., 47 So. 2d 817 in further support of a final assessment of the Department of Revenue being equivalent to a judgment of a circuit court. See, also, Glasner v. Meyrovitz, 132 Ala. 103, 31 So. 360; Tankersley v. Pettis, 71 Ala. 186; Cransby et al v. Cransby et al, 164 Ala. 471, 51 So. 529 for discussion of res judicata.

"The rule in our jurisdiction is that a final assessment of the Department of Revenue unappealed from is as conclusive as a judgment of a circuit court of Alabama, and may be impeached only by a direct proceeding not being subject to collateral attack. State v. Woodroof, 253 Ala. 620, 46 So. 2d 553; State ex rel. Carmichael, Atty. Gen. v. Jones, 252 Ala. 479, 41 So. 2d 280. The right of appeal is clearly statutory and must be exercised in the mode and within the prescribed time. State v. Ide Cotton Mills, 175 Ala. 539, 57 So. 481; Ross Jewelers v. State, 260 Ala. 682, 72 So. 2d 402, 43 A.L.R. 2d 851. The action for a declaratory judgment in the instant case was in effect a collateral attack on a final judgment. . ."

III

A petition for mandamus is an extraordinary writ and this writ may not be granted where a plain, adequate, and complete statutory remedy is available and the petitioners through laches fail to pursue the statutory remedy.

State Board of Administration v. Roquemore, 218 Ala. 120, 123, 117 So. 757 contains an excellent statement of the scope of mandamus.[41] It is as follows:

"In every case the tribunal that is to act must determine in the first instance whether the case is a proper one for its action. And in our opinion the true test of whether

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[41] See also People ex rel. New York Edison Company v. Prendergast, 185 App. 461, 172 N.Y.S. 849; State ex rel. Pulskamp v. Board of County Commissioner of Mercer County, 119 Ohio St. 504, 164 N.E. 755; State ex rel. Bassichis v. Cangerls, 126 Ohio St. 118, 184 N.E. 289; East Ohio Street Hotel Corp. v. Lindheimer, 368 Ill. 294, 13 N.E. 2d 970; Morgan v. Board of County Commissioners of Custer County, 363 P. 2d 1073; Selig v. Price, 167 Miss. 612, 142 So. 504; Miller v. City of Detroit, et al, 250 Mich. 633, 230 N.W. 936; U.S. ex rel Girard Trust Co. v. Helvering, 301 U.S. 540, 57 S.Ct. 855, 81 L.Ed. 1217; Empire Ordinance Corp. v. Harrington, D.C. 249 F 2d 680; Skaer v. Fenner, 349 Ill. App. 321, 110 N.E. 2d 646; Eck. v. State Tax Commission, 204 Md. 245, 103 A. 2d 850

its determination is intended by law to be final, and if not, whether there is any other 'plain, speedy, and adequate remedy.' If the determination of the tribunal was intended to be final, it is plain that it cannot be disturbed, either on mandamus or in any other way. If it was intended to be final, but there is another 'plain, speedy, and adequate remedy,' the writ cannot issue; for it was not designed to usurp the place of other remedies. But if the determination was not intended to be final, and there is no other adequate remedy, the writ must issue. Otherwise there would be an admitted wrong without a remedy. The writ issues in such case to prevent a failure of justice. And this is its ancient office. In the language of Lord Mansfield: 'It was introduced to prevent disorder from a failure of justice and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where, in justice and good government, there ought to be one. Rex. v. Barker, 3 Burr. 1268. See, also, 3 Bla. Com. 110; Tapping on Mandamus, 9; Commonwealth v. Sessions of Hampden, 2 Pick. 418.' Wood v. Strother, 76 Cal. 545, 553, 18 P. 766, 771, 9 Am. St. Rep. 249, 256." (Emphasis supplied)

As in the opinions from other jurisdictions, above, the Supreme Court of Alabama has, likewise, found mandamus to be an extraordinary proceeding and not a substitute for a plain, adequate and complete statutory remedy. In Ex Parte Board of Education of Blount County, et al, 264 Ala. 34, 84 So. 2d 653, the Court stated:

"Since mandamus is an extraordinary remedy to be relied on only where there is no adequate remedy, we entertain the opinion that under the circumstances disclosed it was used improperly by the patrons to test the action of the school board. State ex. rel. Holcombe v. Stone, 232 Ala. 16, 166 So. 602. Said Act 201 §9, provides a method of appeal and review which until tested must be deemed adequate. When tested, should it be found inadequate, then an extraordinary remedy may again be demanded. It is noted that said §9 limits the right of appeal to a determination of whether any constitutional right guaranteed under the federal constitution has been violated.

> But the case before us does not require a discussion of this statutory appeal. The said Act 201 provides for certain preliminary steps, the filing of objection before the board, etc., which the patrons in the instant case did not pursue. Hence they have not exhausted their remedy provided by the Act and the proceedings show on their face that the trial court was without jurisdiction to issue the rule nisi."

Again in Ex Parte State ex rel. Hain,[42] 217 Ala. 702, 117 So. 418, the Court said:

> "Petitioner by this mandamus proceeding seeks a review of the ruling sustaining the demurrer of the surety, and the inquiry arising at the threshold of the consideration of this petition is whether or not the remedy by mandamus is available. That it is an extraordinary writ to be issued only where there is no other adequate legal remedy is not questioned. It is also settled by uniform line of authorities that as a rule of general application that mandamus will not be granted for the purpose of review, and is not available as a substitute for an appeal. * * *"

IV

The Supreme Court of Alabama has, also, been asked to rule on the question of whether a petition for declaratory judgment could be substituted for an appeal under Section 140, supra, where the taxpayer had failed to appeal within the thirty days allowed in Section 140, supra. In every instance the court found that a petition for declaratory judgment was not a substitute for appeal under Section 140.

In Ex Parte State ex rel. Lawson, 2 So. 2d 765, 241 Ala. 304 the Court gave an excellent summary of the office of declaratory judgment acts as follows:

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[42] For additional opinions of the Alabama Supreme Court see: Ex Parte Carroll, 272 Ala. 353, 131 So. 2d 676; Jones v. Jones, 249 Ala. 374, 31 So. 2d 81.

"The courts of the several states have made numerous statements as to the purpose of declaratory judgment act. It has been said that their primary purpose is to relieve litigants of the common law rule that no declaration of rights may be judicially adjudged unless a right has been violated for the violation of which relief may be granted. And further that they render practical help in ending controversies which have not reached the stage where other legal relief is immediately available. Such statutes enable parties between whom an actual controversy exists or between whom litigation is inevitable to have the issues speedily determined where their determination would be delayed to the possible injury of the one or the other if they are compelled to await the courts of ordinary judicial proceedings. They are designed to supply the need of a form of action that will lay controversies at rest before they lead to repudiation of obligations, invasion of rights, and the commission of wrongs. For other expressions as to the purpose of declaratory judgments acts, see 16 Am. Jur. Section 7, page 280; 6 R.C.L.(P.S.) Section 7, page 3956; 50 A.L.R. page 43, anno.; 68 A.L.R. page 110, anno.; 87 A.L.R. 1211 anno.; 101 A.L.R. 690.

* * * * *

"No case is cited, nor has our search revealed one in which it has been held that the right of action for a declaratory judgment is a substitute for an appeal. The nature, history and purpose of the action indicate that the remedy provided is not a substitute for an appeal, and is cumulative rather than exclusive. There is nothing in the Act here involved to indicate a legislative intent that the remedy provided for therein is exclusive. We hold therefore, that it is merely cumulative."

Again in State v. Louis Pizitz Dry Goods Co., 243 Ala. 629, 11 So. 2d 342,[43] the Court said:

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[43] For other opinions of the Supreme Court of Alabama see Mitchell v. Hammond, 252 Ala. 81, 39 So. 2d 582; Henry W. Howle et al d/b/a Deep South Creamry v. Alabama Milk Control Board, 265 Ala. 189, 90 So. 2d 752

"But we have held that when an officer of the State is confronted with an uncertain problem of what the law means which requires certain acts on his part, or whether the law is valid, and he proposes to pursue a certain course of conduct in that connection, which would injuriously affect the interests of others who contend that he has no legal right thus to act, there is thereby created a controversy between them and the Declaratory Judgments Act furnishes a remedy for either party against the other to declare the correct status of the law. The purpose is to settle a controversy between individuals, though some of them may be State Officers. Curry v. Woodstock Slag Corporation, 242 Ala. 379, 6 So. 2d 479.

"The right under the statute to a declaratory judgment is not a substitute for an appeal. Ex parte state, 241 Ala. 304(3), 2 So. 2d 763. It does not exist if adequate relief and appropriate remedy are presently available to the complaining party through other proceedings, State v. Inman, 238 Ala. 555, 191 So. 224.

"An appeal had been taken in this proceeding, and in our opinion it does afford an adequate and appropriate remedy to this taxpayer to determine the question sought to be settled. The situation does not justify an independent suit for declaratory judgment."

This Court in the case of Great Lakes Dredge and Dock Co. v. Huffman(1943), 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 stated its position in regard to granting extraordinary writs.

The petitioners brought a declaratory judgment action against the respondent, a State officer charged with the administration and enforcement of the Louisiana Unemployment Compensation Law, in the Federal District Court seeking to declare the aforesaid statute unconstitutional and void. The District Court found the statute constitutional and dismissed the complaint. The Court of Appeals affirmed the findings of the District Court. The United States Supreme Court held that the judgment of dismissal should be affirmed, but "soley on the ground

that, in the proper exercise of the Court's discretion, relief by way of declaratory judgment should have been denied without consideration of the merits".

The United States Supreme Court reasoned as follows:

> "This Court has recognized that the federal courts, in the exercise of the sound discretion which has traditionally guided courts of equity in granting or withholding the extraordinary relief which they may afford, will not ordinarily restrain state officers from collecting state taxes where state law affords an adequate remedy to the taxpayer. Matthews v. Rodgers, 284 U.S. 521, 52 S.Ct. 217, 76 L.Ed. 447. This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts, or of the settled rule that the measure of inadequacy of the plantiff's legal remedy is the legal remedy afforded by the federal not the state courts. Stratton v. St. Louis S.W.R. Co., 284 U.S. 530, 533, 534, 52 S.Ct. 222, 223, 76 L.Ed. 465; Di Giovanni v. Camden Fire Ins. Ass'n, 296 U.S. 64, 69, 56 S.Ct. 1, 4, 80 L.Ed. 47. On the contrary, it is but a recognition that the jurisdiction conferred on the federal courts embraces suits in equity as well as at law, and that a federal court of equity, which may in an appropriate case refuse to give its special protection to private rights when the exercise of its jurisdiction would be prejudicial to the public interest (United States v. Dern, 289 U.S. 352, 359, 360, 53 S.Ct. 614, 617, 77 L.Ed. 1250; Virginian Ry. v. System Federation, 300 U.S. 515, 549-553, 57 S.Ct. 592, 600, 602, 81 L.Ed. 789), should stay its hand in the public interest when it reasonably appears that private interests will not suffer. See Commonwealth of Pennsylvania v. Williams, 294 U.S. 176, 185, 55 S.Ct. 380, 385, 79 L.Ed. 841, 96 A.L.R. 1166, and cases cited.
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> "It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.

Even in equity where procedure is less often held inviolate, than at law–in which forum the instant case was heard–the court is bound by the statutes of limitation.

McClintock on Equity, Section 26(2), p. 38, states the Respondent's argument most cogently as follows:

> "Where the assertion of a claim in equity has been delayed for a period equal to the analogous statute of limitations, it will generally be held laches, regardless of prejudice."

McClintock[45] enlarges on the preceding concept as follows:

> "The original statute of limitations did not apply to suits in equity. But in cases where the chancellors were asked to give equitable protection to a legal right, they adopted the practice of holding that a delay in the assertion of the right which would bar an action at law thereon under the statute of limitations would ordinarily amount to laches which precluded relief in equity. The effect of the practice was that, in case where the delay was less than that which would bar an action at law, the defendant must show that it was unreasonable under the circumstances; delay of a longer period would bar relief unless plaintiff could affirmatively show that it was reasonable. Later statutes of limitations apply to suits in equity as well as to actions at law. While equity courts cannot disregard these statutes by entertaining a suit after the term fixed by the statute has expired, they still may find a delay less than the time fixed by the statute to be unreasonable and prejudicial, and therefore to preclude recovery." (Emphasis supplied)

The Petitioners had a plain, adequate, and complete statutory remedy which they failed to avail themselves of and they cannot substitute a mandamus proceeding for the plain, adequate and complete statutory remedy. The opinion of the Supreme Court of Alabama is due to be affirmed and the Petition for Writ of Certiorari denied. The Fifth Circuit Court of

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[45] McClintock on Equity, Section 26(2), p. 40

Appeals in Lasker Boiler and Engineering Corp. v. Hamm, No. 20600 summed up the matter very well as follows:

> "We agree with the judgment of the district court. The State of Alabama provided 'a plain, speedy, and efficient remedy' within the meaning of 28 U.S.C.A. § 1341. The district court very properly refused to issue an injunction against the State Commissioner of Revenue.

Respectfully submitted,

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WILLARD W. LIVINGSTON
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HERBERT I. BURSON, JR.
Assistant Counsel, Department of Revenue, and Assistant Attorney General, State of Alabama,

Counsel for Respondent.

APPENDIX "A."

September 17, 1957

Leo E. & Cora Y. Bashinsky
7 Rock Del Lane
Birmingham, Alabama

Re: Alabama Income Tax 1953,55 & 56

Dear Mr. & Mrs. Bashinsky:

Enclosed are schedules showing adjustments to your income tax returns for the years shown above, as recommended by our agent, Mr. L. A. Wessinger. The adjustments reflect income tax deficiencies for 1953 and 1956, and an overpayment for 1955, as shown below:

1953 Deficiency	$ 79.08
1956 Deficiency	5,778.66
1955 Overassessment	(102.72)

Each of the above deficiencies bears interest at 6% from due date of the returns, until date of payment, as well as the overassessment. The deficiencies may be reduced by the overassessment, plus interest, properly computed thereon.

It is requested that you let us have remittance for the net amount due so that your file for these years might be closed.

Very truly yours,

/s/ E. A. Erwin

E. A. Erwin, Chief,
Income Tax Division